BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES P. MASON, DECEASED Claimant VS. **JAMES MASON ENTERPRISES, INC.** Respondent AND **UNITED STATES FIDELITY & GUARANTY COMPANY** Insurance Carrier	)	Docket No. 109,354

ORDER

Both the claimants and the respondent and its insurance carrier appeal from a November 20, 1995 Order of Administrative Law Judge Shannon S. Krysl. Oral arguments were heard by the Appeals Board on February 6, 1996.

APPEARANCES

Claimants appeared by and through their attorney Charles C. Steincamp of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Gary A. Winfrey of Wichita, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board includes the transcripts of the November 14, 1995 motion hearing before Administrative Law Judge Shannon S. Krysl and the exhibits attached thereto, including the transcript of the May 2, 1995 settlement hearing before Special Administrative Law Judge David J. Wood; together with the pleadings and other documents filed of record with the Division of Workers Compensation in this docketed claim.

The stipulations of the parties include those made for purposes of the May 2, 1995 settlement together with the following stipulations entered into by the parties for the purpose of this review:

1. On January 7, 1985, claimant met with personal injury by accident arising out of and within the course of his employment with the respondent.

2. On February 4, 1985, claimant died as a result of the injuries sustained in the accidental injury.

3. At the time of the accidental injury, the parties to this claim were operating under and subject to the provisions of the Kansas Workers Compensation Act.

4. USF&G was the insurance carrier for the respondent.

5. Claimant's average weekly wage at the time of the accidental death was $876.92. That amount is sufficient to reach the maximum weekly compensation rate applicable on the date of the death of the claimant in the amount of $227.

6. Claimant left the following dependents who were living with and wholly dependent on him at the time of his death:

Dorothy J. Mason, spouse;
Ryan J. Mason, DOB: 12/11/79, dependent child; and
Evan W. Mason, DOB: 8/29/84, dependent child.

7. There exist no other persons that are wholly dependent upon the claimant at the time of his death. Neither the claimant nor his spouse Dorothy J. Mason were previously married or have children other than the two referred to above. Dorothy J. Mason was not pregnant at the time of the claimant's death.

8. Respondent had notice of the accidental injury and death of the claimant.

9. Claimant's dependents have made timely written claim for compensation upon respondent as required by law.

10. Medical and hospital expenses totalling $57,786.74 incurred as a result of the claimant's personal injuries and death and have been paid by USF&G.

11. The statutory maximum reimbursement of $3,200 for funeral expense has been paid by USF&G and presented to the widow, Dorothy J. Mason, at the settlement hearing on May 2, 1985.

12. Pursuant to the settlement on May 2, 1985, USF&G has paid weekly death benefits of $227.00, one-half to the widow Dorothy J. Mason, and one-half to the dependent children, Ryan J. Mason and Evan W. Mason.

13. The total of $125,024.00 has been paid in death benefits to the widow and children as of July 31, 1995.

14. The widow was paid $10,847.00 after the statutory maximum of $100,000 had been reached. Said $10,847.00 is an overpayment.

15. Pursuant to K.S.A. 44-510b(h) applicable at the time of injury, USF&G has satisfied their obligations to the widow and no further weekly death benefits are due and owing to the widow from the respondent and insurance carrier.

ISSUES

The November 14, 1995 hearing before the Administrative Law Judge was held pursuant to a Form E-2 Surviving Spouse Or Dependent Application For Hearing which was filed by claimant to resolve a dispute concerning the payment of benefits to the surviving minor dependents of James P. Mason, deceased. The dispute arose following the payment of the statutory maximum benefits to the surviving spouse. The respondent and its insurance carrier continued to pay the two surviving minor children the same weekly benefit they had been receiving prior to the termination of benefits to the surviving spouse. Claimants argue that the total weekly benefit of $227.00 should be reapportioned as between the two minor children, 50 percent each. The Administrative Law Judge found that weekly benefits are not subject to reapportionment and that benefits are to be continued paid to the minor children at the prior weekly rate of $56.75 per child. This was

the rate in effect when the employer paid the $100,000.00 statutory maximum. The Administrative Law Judge further found that the minor children are entitled to their weekly benefit rate until age 23 or as long after age 18 as they each can demonstrate that they are enrolled as a full-time student in an accredited institution of higher education, or institution of vocational education or they are physically or mentally disabled and incapable of engaging in any type of substantial, gainful employment.

The respondent and its insurance carrier appeal raising the following issues:

1. Whether minor children receiving weekly death benefits pursuant to K.S.A. 44-510b(h) are entitled to receive said benefits after they have reached 18 years of age.

The claimants likewise appeal seeking review of the following issues:

2. Whether respondent has standing to challenge apportionment of compensation benefits;

3. Whether minor children receiving weekly compensation benefits pursuant to K.S.A. 44-510b(h) are entitled to reapportionment of compensation paid to a surviving spouse after the total payments have reached the statutory maximum of $100,000;

4. Whether compensation benefits should be reapportioned to the younger child when the older child reaches the age of majority; and

5. Whether claimants are entitled to attorney fees from respondent for the motion and this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and having considered the arguments and briefs of the parties, the Appeals Board finds as follows:

(1) The minor children are not entitled to receive weekly compensation benefits after they have reached 18 years of age where the maximum amount of compensation benefits payable under K.S.A. 44-510b(h) has been paid. The Order of the Administrative Law Judge to the contrary is therefore reversed.

K.S.A. 1983 Supp. 44-510b(h) provides:

> "(h) Notwithstanding any other provision in this section to the contrary, the maximum amount of compensation benefits payable under this section to any and all dependents by the employer shall not exceed a total amount of $100,000 and when such total amount has been paid the liability of the employer for any further compensation under this section to dependents, other than minor children of the employee, shall cease except that the payment of compensation under this section to any minor child of the employee shall continue for the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated under this

> subsection and shall not be subject to termination under this subsection until such child becomes 18 years of age."

This statute is clear and unambiguous in stating that death benefits terminate when a surviving minor child becomes 18 years of age "notwithstanding any other provision in this section to the contrary." Claimants, the surviving children of the decedent, contend they are entitled to benefits until they reach the age of 23, if enrolled in an accredited institution of higher education or disabled, citing K.S.A. 1983 Supp. 44-510b(a)(3) which provides:

> "Any wholly dependent child of the employee shall be paid compensation, except as otherwise provided in this section, until such dependent child becomes 18 years of age, except that any such dependent child who is not physically or mentally capable of earning wages in any type of substantial and gainful employment, or who is enrolled as a full-time student in an accredited institution of higher education or vocational education shall be paid compensation until such dependent child becomes 23 years of age." (Emphasis added.)

The above-quoted statute clearly provides that its provisions apply to "any wholly dependent child of the employee except as otherwise provided in this section." Thus, K.S.A. 1983 Supp. 44-510b(a)(3) only controls if the situation is not otherwise specifically addressed. K.S.A. 1983 Supp. 44-510b(h) is such an exception as contemplated in the wording in K.S.A. 1983 Supp. 44-510b(a)(3). Accordingly, once the maximum amount of compensation benefits have been paid, the exception for minor children as provided in K.S.A. 1993 Supp. 44-510b(h) applies and its provisions are controlling.

(2) The respondent and insurance carrier have standing to challenge apportionment of benefits.

Claimants contend that respondent has no standing to challenge the apportionment of benefits citing McCormick, et al. v. Cole and Coke Co., 117 Kan. 686, 232 Pac. 1071 (1925). The Appeals Board disagrees. The Administrative Law Judge did not directly address this issue in her Order of November 20, 1995. However, by implication, the Administrative Law Judge determined that the respondent has standing to challenge the apportionment of benefits and to this extent the Order of the Administrative Law Judge is affirmed.

The McCormick case is readily distinguishable. The workers compensation statutes which were applied in McCormick were not the same as those which are applicable to the case at bar. In 1920, the time of the death of H.E. McCormick, the amount of death benefits payable to his dependents could be determined at the time of said employee's death. The only remaining issue then was how to apportion that sum between the appropriate dependents. However, as is evident by the issues presented in this appeal, the statutes applicable to this case allow for the determination and extension and benefits in many differing situations. Thus, it was not clear at the beginning of the claim how much the employer would have to pay. The respondent and insurance carrier herein continue to have a significant financial stake in the outcome of this claim. It would be inappropriate to deny them a voice in the determination of the issues presented by this case. This issue was addressed by the Kansas Court of Appeals in the case of Lackey v. D & M Trucking, 9 Kan. App. 2d 679, 687 P.2d 23 (1984), wherein the following was stated:

> "Claimants question whether respondent can appeal a reapportionment decision and cite the general rule from McCormick et al. v. Coal & Coke Co., 117 Kan. 686, 692, 232 Pac. 1071 (1925), that 'the employer cannot appeal from an apportionment among dependents wholly dependent, because it is a matter which does not concern him.' However, since respondent argues the amount of compensation requested by claimants and awarded by the court is erroneous, the respondent's interests and concerns are clearly involved. See McCormick, 117 Kan. at 692-93." *Id* at 683.

(3) The minor children receiving weekly compensation benefits pursuant to K.S.A. 1983 Supp. 44-510b(h) are entitled to reapportionment of benefits paid to the surviving spouse after the total payments have reached the statutory maximum. The Order of the Administrative Law Judge is reversed as to this issue.

Benefits in the case of death under workers compensation are governed by K.S.A. 1983 Supp. 44-510b. The statute reads as follows:

> "Where death results from injury, compensation shall be paid as provided in K.S.A. 44-510 [medical compensation] and amendments thereto, and as follows:
>
> "(a) If an employee leaves any dependents wholly dependent upon the employee's earnings at the time of the accident, all compensation benefits under this section shall be paid to such dependent persons. Such dependents shall be paid weekly compensation, except as otherwise provided in this section, in a total sum to all such dependents, equal to 66⅔% of the average gross weekly wage of the employee at the time of the accident, computed as provided in K.S.A. 44-511 and amendments thereto . . . ."
>
> The statute further provides that:
>
> "(h) Notwithstanding any other provision in this section to the contrary, the maximum amount of compensation benefits payable under this section to any and all dependents by the employer shall not exceed a total amount of $100,000 and when such total amount has been paid the liability of the employer for any further compensation under this section to dependents, other than minor children of the employee, shall cease except that the payment of compensation under this section to any minor child of the employee shall continue for the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated under this subsection and shall not be subject to termination under this subsection until such child becomes 18 years of age." (Emphasis added.)

The plain language of the statute provides that when $100,000 in total benefits have been paid to dependents, compensation to all dependents other than minor children ceases. The statute then provides that the compensation to minor children of the employee continues during the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated. The weekly rate of compensation is defined in K.S.A. 44-510b(a) to be equal to 66⅔% of the average gross weekly wage of the employee at the time of the accident. Therefore, the plain language of the statute

provides that when the statutory maximum has been reached with respect to dependents other than minor children, the minor children should be paid the full amount of the award during the period of their minority. As claimants point out, respondent's position and that adopted by the Administrative Law Judge below would rewrite the statute to read:

> "The payment of compensation under this section to any minor child of the employee shall continue for the period of the child's minority at the weekly rate that they were receiving benefits in effect when the employer's liability is otherwise terminated under this subsection . . . ." (Emphasis added.)

In the case of Baxter v. Chicago, Rock Island and Pacific Railway Co., 141 Kan. 527, 41 P.2d 999 (1935) the claim for compensation of the wholly dependent widow was denied because she failed to make the required claim in writing within the time prescribed by the statute. The entire award was reapportioned to the wholly dependent minor child. The court, citing the predecessor statute to K.S.A. 44-510b(e), found jurisdiction with the compensation commissioner and the power to apportion and reapportion the compensation benefits allowed on the death of an employee. The court found that when the spouse failed to satisfy the procedural requirements necessary to entitle her to compensation, her claim ended and all of the benefits were to be reapportioned to the dependent minor child. Claimants assert and the Appeals Board so finds that the same rule is applicable to this situation where the statutory maximum has been reached. The spouse's claim ends and the full weekly compensation benefits are paid to the minor dependent children.

(4) Compensation benefits should be apportioned to the younger child when the older child reaches the age of majority. The Order of the Administrative Law Judge is reversed as to this issue.

The logic which dictates reapportionment of benefits to the minor children upon the cessation of benefits being paid to a surviving spouse after the total payments have reached the statutory maximum, likewise, would apply to the issue of reapportionment of benefits to the remaining minor child upon his brother's reaching the age of majority. Any other interpretation would result in disparate treatment of workers based upon their number of wholly dependent children. If, on the date of his death, the decedent had had only one son, respondent would have had to pay the entire weekly benefit until such child reached the age of majority. The fact that the decedent had two children should not work to the disadvantage of the younger child. The employer should not be relieved of its obligation where there remains a person in that class of wholly dependent child. Once the older sibling reaches the age of majority, benefits should be reapportioned such that the entire weekly compensation benefit would be payable to the remaining minor child. In this way, the amount of the weekly benefit payable remains the same, just as it does with the reapportionment to the minor children upon the cessation of benefits to the surviving spouse.

(5) Counsel for claimants is entitled to a reasonable attorney fee from the respondent for the motion and this appeal.

The Order of the Administrative Law Judge is silent as to attorney fees. The Appeals Board does not take that silence to suggest a determination by the Administrative Law Judge that no fee was appropriate. The Appeals Board finds claimants' Motion to Determine Benefits and this appeal to be within the purview of K.S.A. 44-536. See Lackey v. D & M Trucking, 9 Kan. App. 2d 679, 685, 687 P.2d 23 (1984). As such, claimants'

attorney is entitled to reasonable attorney fees for his services in connection therewith. Unfortunately, claimants' counsel did not present any evidence of the time he spent on this case or otherwise provide any indication of the amount of attorney fees he is seeking. The record is inadequate to determine a reasonable fee. Accordingly, this matter is remanded pursuant to K.S.A. 44-551(b)(1) to the Administrative Law Judge for further proceedings on the issue of a reasonable attorney fees.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the November 20, 1995 Order of Administrative Law Judge Shannon S. Krysl should be, and the same is hereby, reversed as to Issue Nos. 1, 3 and 4; affirmed as to Issue No. 2; and remanded as to Issue No. 5.

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Charles C. Steincamp, Wichita, KS
Gary A. Winfrey, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director